

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

FRANK LOUIS SPANO,

Defendant-Appellee.

UNPUBLISHED

May 14, 1999

No. 202378

Oakland Circuit Court

LC No. 96-149065 FH

Before: Smolenski, P.J., and McDonald and Saad, J.

McDONALD, J. (*dissenting*).

I respectfully dissent. I agree with the majority that certain circumstances, such as an officer's justifiable fear for personal safety or the safety of others, may justify more intrusive means of effectuating an investigatory stop without converting the stop into an arrest. *US v Hardnett*, 804 F2d 353, 356-357 (CA 6, 1986); *People v Zuccarini*, 172 Mich App 11, 14; 431 NW2d 446 (1988). However, I believe the circumstances in this case did not justify the highly intrusive nature of the stop. The officer ordered defendant onto the ground at gunpoint, called for backup, handcuffed defendant, and placed him in the back of a patrol car. The officer did not have any information that the suspect of the crime he was investigating was considered armed and dangerous. The stop did not closely follow a dangerous crime and police had no information that a violent crime was about to occur. Instead, the crime involved was attempted larceny from an automobile. Moreover, defendant was not uncooperative and did not take any action that raised a reasonable possibility of danger or flight. Accordingly, I believe that none of the factors set forth in the case relied upon by the majority, *Washington, supra* at 1189-1190, are present in this case. I disagree with the majority's feeling that this case is a close one. I believe an arrest clearly occurred in this case.

I also disagree with the majority's conclusion that defendant freely and unequivocally consented to the seizure of his bicycle. After hearing the testimony in this case, the trial court found that defendant's consent was not voluntary. I do not believe this finding was clearly erroneous. *People v Goforth*, 222 Mich App 306, 310; 564 NW2d 526 (1997).

I would affirm the trial court's dismissal of this case.

/s/ Gary R. McDonald